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Nos. 87-1729 and 88-454

In the Supreme Court of the United States

OCTOBER TERM, 1988

CAPLIN & DRYSDALE, CHARTERED, PETITIONER

v.

UNITED STATES OF AMERICA

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v.

PETER MONSANTO

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FOURTH AND SECOND CIRCUITS

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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Pursuant to Rule 35.5 of the Rules of this Court, we respectfully file this supplemental brief to bring to the Court's attention the recent decision of the United States Court of Appeals for the Eleventh Circuit in *United States* v. *Bissell*, No. 87-8246 (Mar. 2, 1989).[1] The Eleventh

[1] We have lodged ten copies of the opinion in *Bissell* with the Clerk of this Court.

Circuit there rejected the defendants' contention that their convictions under the federal drug laws should be reversed because the pretrial restraint of assets under 21 U.S.C. 853(e)(1)(A) and (f) (Supp. IV 1986) prevented them from using restrained assets to hire a lawyer. The court addressed four issues that are relevant to the instant cases.

First, the court in *Bissell* concluded that "[t]he language and legislative history of section 853 evidence Congress' goal of reaching as many illegal assets as constitutionally permissible," and it therefore held that Section 853 "reaches all illegal funds, including those earmarked for payment to attorneys." On this point, the court expressly agreed with the decisions of the Fourth, Seventh, and Tenth Circuits in *Caplin & Drysdale, Moya-Gomez*, and *Nichols*.[2] Slip op. 1593.

Second, the court rejected the contention that the pretrial restraints deprived the defendants of an opportunity, protected by the Sixth Amendment, to retain counsel of their choice. Slip op. 1593-1595. As an initial matter, the court explained that the United States was not a mere creditor, for whom assets were restrained to secure payment of a debt owed to it by the defendants. Rather, the court stressed, by virtue of the provision in Section 853(c) that vests title in the United States as of the time the defendant commits the act giving rise to forfeiture, the indictment in *Bissell* effectively charged that "none of the defendants have ever owned any of these assets," because "[a]ll of the assets were the property of the government the moment they were derived from, or utilized in, the criminal activities condemned." Slip op. 1594. On this

[2] *In re Forfeiture Hearing As To Caplin & Drysdale*, 837 F.2d 637, 641-642 (4th Cir. 1988) (en banc), cert. granted, No. 87-1729 (Nov. 7, 1988); *United States* v. *Moya-Gomez*, 860 F.2d 706, 728 (7th Cir. 1988); *United States* v. *Nichols*, 841 F.2d 1485, 1491-1496 (10th Cir. 1988).

basis, the court found no Sixth Amendment violation. The court reasoned that the Sixth Amendment affords a defendant only "the opportunity to select his own counsel *at his own expense*," not the "right to use assets to the extent that those assets belonged to the United States." *Id.* at 1594-1595 (emphasis in original; citation omitted). The fact that a defendant cannot afford private counsel as a result of the operation of Section 853 "is of no Sixth Amendment significance," the court concluded, because "a defendant may not insist on representation by an attorney he cannot afford," and because his fundamental right to the assistance of counsel will be protected through appointment of counsel, if necessary. *Id.* at 1595.

Third, applying the four-part test of *Barker* v. *Wingo*, 407 U.S. 514 (1972), and *United States* v. *$8,850*, 461 U.S. 555 (1983), the Eleventh Circuit held in *Bissell* that the defendants' due process rights were not violated by the postponement of a post-restraint hearing until the criminal trial itself. Slip op. 1595-1598. The court reasoned that: (1) the eight-month period between the imposition of restraints and the trial was not excessive (slip op. 1597); (2) there were substantial reasons for not holding a full-blown hearing on the merits of the government's case until trial, because of the potential for jeopardizing the safety of witnesses and premature disclosure of the government's case (slip op. 1597); (3) the defendants did not contend that the seizures and other restraints were unsupported by probable cause or applied to assets beyond the scope of the indictment (slip. op. 1597-1598); and (4) the effect of the restraints on the defendants' Sixth Amendment interest in retaining counsel of their choice must be considered in light of the United States' claim of title to the same assets and the district court's exercise of control through its issuance of restraining orders or seizure warrants, which provide a significant check on the government's power to

restrain legitimate assets (slip op. 1598-1599, citing *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974)).

Fourth, following the reasoning in *Caplin & Drysdale*, 837 F.2d at 648, and *Nichols*, 841 F.2d at 1508, the Eleventh Circuit held that the mere possibility of prosecutorial abuse does not render the forfeiture statute itself unconstitutional. In the court's view, any allegations of abuse can be adequately considered in the circumstances of a particular case. Because no prosecutorial bad faith was evident in *Bissell* and because the district court had made a determination of probable cause, either on its own or upon the grand jury's return of the indictment, the Eleventh Circuit found no improper denial of the defendants' qualified Sixth Amendment right to the assistance of counsel of their choice. Slip op. 1599-1600.

Respectfully submitted.

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